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SUPREME COURT, U.S.
FILED
DEC 29 2004
OFFICE OF THE CLERK

No. 04-438

In the Supreme Court of the United States

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1617, ET AL., PETITIONERS

v.

FEDERAL LABOR RELATIONS AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the district court lacked subject-matter jurisdiction over petitioners' challenge to a decision by the Federal Labor Relations Authority which set aside an arbitration award on the ground that the award was "contrary to [a] law, rule, or regulation" under 5 U.S.C. 7122(a)(1).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is not published in the Federal Reporter, but is *reprinted in* 103 Fed. Appx. 802. The order of the district court (Pet. App. 11a-19a) is unreported. The report and recommendation of the magistrate judge is unreported, but is *available in* 2003 WL 21919486. The decision of the Federal Labor Relations Authority (Pet. App. 20a-41a) is reported at 58 F.L.R.A. 63.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 2004. The petition for a writ of certiorari was filed on September 27, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. 7101 *et seq.*, governs labor relations between federal agencies and their employees. That statute established the Federal Labor Relations Authority (FLRA), 5 U.S.C. 7104, which plays a role analogous to that of the National Labor Relations Board (NLRB) in the private sector, *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 464 U.S. 89, 92-93 (1983). Among its other responsibilities, the FLRA is empowered to review the decisions of arbitrators in disputes involving federal employees, 5 U.S.C. 7105(a)(2)(H), and to set aside such a decision either on the ground that it is "contrary to any law, rule, or regulation," 5 U.S.C. 7122(a)(1), or "on other grounds similar to those applied by Federal courts in private sector labor-management relations," 5 U.S.C. 7122(a)(2). Although final orders by the FLRA are ordinarily subject to review by the federal courts of appeals, orders involving arbitral awards are not, unless the underlying dispute concerns unfair labor practices. 5 U.S.C. 7123(a).

2. a. Petitioners are a labor union, its successor, and an employee of the San Antonio Air Logistics Center (the Center) at Kelly Air Force Base in San Antonio, Texas. In April 1999, acting through the union, a group of employees brought a grievance against the Center, contending that they were entitled to receive Environmental Differential Pay (EDP), pursuant to 5 C.F.R. 532.511, as a result of their exposure to airborne asbestos. The Center denied the grievance, and the union invoked arbitration pursuant to the employees' collective bargaining agreement. Pet. App. 2a.

b. The arbitrator sustained the grievance and awarded EDP to the employees. Pet. App. 42a-70a (ex-

cerpts of decision). The arbitrator noted that the employees' collective bargaining agreement established no specific level of exposure to asbestos at which the employees' entitlement to EDP would be triggered. *Id.* at 22a. Moreover, the arbitrator found that an Air Force regulation adopted a standard issued by the Occupational Safety and Health Administration (OSHA) as the standard for determining entitlement to EDP for exposure to asbestos. *Id.* at 22a-23a. Under the OSHA standard, it was conceded that the employees would not be entitled to EDP. *Id.* at 21a. Nevertheless, the arbitrator refused to apply the OSHA standard contained in the Air Force regulation. *Id.* at 24a. The arbitrator reasoned that "there [was] insufficient evidence to establish that the parties agreed that the OSHA [standard] would serve as the trigger point for EDP." *Id.* at 63a. Instead, the arbitrator concluded that the employees were entitled to EDP because "it [was] reasonably possible that [their] exposure may result in injury or illness," and because "[p]rotective equipment or other safety device[s] [have] not essentially removed the possibility of such injury or illness." *Id.* at 68a.

c. Over the dissent of one member, the FLRA set aside the award on the ground that it was "contrary to [a] law, rule, or regulation" for purposes of 5 U.S.C. 7122(a)(1). Pet. App. 20a-41a. The FLRA explained that, under its own precedent, an arbitrator could establish a standard for determining entitlement to EDP only when neither the agreement of the parties nor an applicable regulation had already set such a standard. *Id.* at 29a-30a. According to the FLRA, the Air Force regulation at issue was properly read to establish a standard for entitlement to EDP. *Id.* at 30a-33a. The FLRA then rejected the union's contention that the Air Force regulation conflicted with the terms of the em-

ployees' collective bargaining agreement. *Id.* at 33a-36a. The FLRA reasoned that the arbitrator erred by failing to recognize that, "where an agency regulation sets a specific standard that addresses a matter in dispute, that standard applies unless it conflicts with the parties' collective bargaining agreement." *Id.* at 34a (citing *United States Dep't of the Army, Fort Campbell Dist., Third Region*, 37 F.L.R.A. 186, 195 (1990)). It was irrelevant that the union did not specifically consent to the regulatory standard, because the collective bargaining agreement neither adopted its own standard nor disavowed the application of the regulatory standard. *Id.* at 35a-36a.

3. Notwithstanding 5 U.S.C. 7123(a), which precludes federal courts of appeals from reviewing most final orders of the FLRA involving arbitral awards, petitioners filed suit against respondent FLRA in the United States District Court for the Western District of Texas, challenging the FLRA's decision. A magistrate judge recommended dismissal of petitioners' suit for lack of subject-matter jurisdiction, 2003 WL 21919486, and the district court adopted the magistrate judge's report and recommendation, Pet. App. 11a-19a. The district court reasoned that, in light of 5 U.S.C. 7123(a), there was no subject-matter jurisdiction over petitioners' action unless it fell within the "narrow" and "rarely used" exception articulated by this Court in *Leedom* v. *Kyne*, 358 U.S. 184 (1958). Pet. App. 15a. In *Leedom*, the district court noted, this Court recognized an exception to the general rule that federal district courts lack jurisdiction to review decisions of the NLRB, holding that jurisdiction exists over cases in which the NLRB acted "in excess of its delegated powers and contrary to a specific prohibition in the [National Labor Relations Act]." *Id.* at 17a (quoting *Lee-*

dom, 358 U.S. at 188). The district court concluded that "[petitioners] have not demonstrated that the [FLRA]'s decision to apply a regulatory standard for EDP, when the collective bargaining agreement did not expressly provide any specific standard for EDP (or even an express 'case by case' standard), was in excess of statutory powers, in violation of a clear mandate of its own enabling statute, or an egregious error." *Id.* at 17a-18a.

4. In an unpublished *per curiam* opinion, the court of appeals affirmed. Pet. App. 1a-10a. Like the district court, the court of appeals observed that the *Leedom* exception to the general jurisdictional bar is "very narrow." *Id.* at 4a. The court of appeals noted that, in subsequent decisions, this Court has refused to apply the *Leedom* exception when a party was merely challenging a factual finding by the NLRB, or when the authorizing statute at issue provided a meaningful opportunity for other judicial review. *Id.* at 4a-5a (citing *Boire* v. *Greyhound Corp.*, 376 U.S. 473 (1964), and *Board of Governors of the Fed. Reserve Sys.* v. *MCorp Fin., Inc.*, 502 U.S. 32 (1991)). The court concluded that the *Leedom* exception "should be used to correct only egregious error" and "does not allow federal courts to review whether an agency responsible for implementing a statute has misinterpreted that statute." *Id.* at 5a.

Applying that standard, the court of appeals held that petitioners could not demonstrate that the FLRA had violated any statutory provision by overturning the arbitrator's award. Pet. App. 6a-8a. The court reasoned that the FLRA "found that the award was deficient because it was contrary to law" for purposes of 5 U.S.C. 7122(a)(1). Pet. App. 6a. The court rejected petitioners' contention that the FLRA had overturned the arbitrator's factual findings. *Id.* at 7a. As the court ex-

plained, the arbitrator found only that the union had taken the position *in bargaining* that the standard for entitlement to EDP should be determined on a case-by-case basis; the arbitrator did not find that the collective bargaining agreement itself contained such a requirement. *Id.* at 7a-8a. The court concluded that "FLRA acted within its authority in determining that Agency regulations govern the assessment of EDP in this case, where there was no other agreement governing that assessment." *Id.* at 8a.

Finally, the court of appeals rejected petitioners' arguments that jurisdiction should nevertheless lie either under this Court's decisions in the "*Steelworkers* trilogy"[1] or for reasons of public policy. Pet. App. 8a-10a. As to the former argument, the court explained that the decisions in the *Steelworkers* trilogy "deal with federal court review of employment arbitration decisions" and "do not provide guidance on this court's jurisdiction over FLRA decisions." *Id.* at 9a. As to petitioners' public-policy concerns, the court reasoned that the FLRA's decision did not undermine the right to collective bargaining, because it did not hold that an agency regulation could trump a provision in a collective bargaining agreement. *Id.* at 10a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is therefore not warranted.

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[1] *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960).

1. Petitioners contend (Pet. 15-19) that the court of appeals' decision conflicts with this Court's decision in *Leedom* v. *Kyne*, 358 U.S. 184 (1958), and its progeny. That contention lacks merit.

In *Leedom*, the NLRB issued an order certifying a bargaining unit that included certain professional employees, notwithstanding the fact that the NLRB had not held a separate vote of the professional employees, as expressly required by the National Labor Relations Act, in order to determine whether they supported the unit. 358 U.S. at 185-186. Although the certification order was not a "final order" subject to judicial review, this Court allowed an employee to challenge the order in federal district court. *Id.* at 187-188. The Court held that, when a party was seeking to "strike down an order of the [NLRB] made in excess of its delegated powers and contrary to a specific prohibition in the [National Labor Relations Act]," a federal district court would have jurisdiction. *Id.* at 188. The Court reasoned that it could not "lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." *Id.* at 190.

In this case, the court of appeals held (Pet. App. 5a-6a) that the *Leedom* exception to the general rule concerning federal-court jurisdiction over NLRB decisions *could* apply to decisions by the FLRA involving arbitral awards—even though the FLRA's authorizing statute contains a clear indication of Congress's intent to preclude judicial review of those decisions. Because the court of appeals expressly recognized the availability of the *Leedom* exception for challenges to FLRA decisions, petitioners cannot colorably claim that the court of appeals' decision conflicts with *Leedom* itself.

Petitioners further contend (Pet. 16, 18) that the court of appeals erred by "applying" this Court's decisions in *Boire* v. *Greyhound Corp.*, 376 U.S. 473 (1964), and *Board of Governors of the Federal Reserve System* v. *MCorp Financial, Inc.*, 502 U.S. 32 (1991), to decisions of the FLRA. In those cases, this Court refused to allow the *Leedom* exception to be invoked at all, either because a party was merely challenging a factual finding by the agency (in *Boire*) or because the authorizing statute at issue provided a meaningful opportunity for other judicial review (in *MCorp*). See *Boire*, 376 U.S. at 481; *MCorp*, 502 U.S. at 43-44. Although the court of appeals discussed both *Boire* and *MCorp* (Pet. App. 4a-5a), it did not rely on either of those cases in order to "extinguish[] *Leedom* jurisdiction in its entirety," as petitioners suggest (Pet. 16); instead, the court cited those cases solely for the proposition that the *Leedom* exception is "narrow" and "rarely applied"—a proposition that petitioners do not contest (Pet. 17). Nothing in the court of appeals' decision is inconsistent with either *Boire* or *MCorp*.

In the alternative, petitioners seemingly suggest (Pet. 18-19) that the court of appeals erred in its *application* of the *Leedom* exception by holding that the district court lacked subject-matter jurisdiction in this case. That narrow, case-specific claim, however, does not merit this Court's review. The court of appeals concluded (Pet. App. 6a-8a) that the FLRA had not acted "in excess of its delegated powers and contrary to a specific prohibition in [its authorizing statute]" by setting aside the arbitral award, *Leedom*, 358 U.S. at 188, because the FLRA had set aside the award on the ground that it was "contrary to [a] law, rule, or regulation" for purposes of 5 U.S.C. 7122(a)(1). Specifically, the court of appeals determined that the FLRA, relying

on the arbitrator's finding that the collective bargaining agreement did not adopt a standard for determining eligibility for EDP, had merely applied its own binding precedent that, "in the absence of an agreed-upon [standard,] the [a]gency's own regulation governs." *Id.* at 8a. Although petitioners question whether the FLRA correctly construed the arbitrator's findings, they do not assert that the court of appeals' ultimate holding (*viz.*, that the *Leedom* exception was inapplicable) conflicts with the decision of any other court in similar factual circumstances. Accordingly, further review of that holding is not warranted.[2]

2. Petitioners also contend (Pet. 10-15, 19-23) that the court of appeals' decision conflicts with the *Steelworkers* trilogy. That contention lacks merit as well.

In the *Steelworkers* trilogy, this Court held, in the context of private-sector arbitral awards, that an arbitrator's construction of a collective bargaining agreement is entitled to a high degree of deference. See, *e.g.*, *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). Petitioners assert that 5 U.S.C. 7122(a)(2), which authorizes the FLRA to set aside a public-sector arbitral award "on * * * grounds similar to those applied by Federal courts in private sector labor-management relations," requires the FLRA to use the same standards applicable to the review of private-sector arbitral awards, and therefore to use the deferential standard of review articulated in the

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[2] Contrary to petitioners' repeated assertions, moreover, the FLRA did not conclude that the arbitrator had misinterpreted the collective bargaining agreement, and then substitute its own interpretation; instead, the FLRA merely concluded that the arbitrator himself had interpreted the collective bargaining agreement as not adopting a standard for determining eligibility for EDP. Pet. App. 35a-36a.

Steelworkers trilogy. In cases arising under Section 7122(a)(2), courts have consistently suggested that the standard of review from the *Steelworkers* trilogy governs, see, *e.g.*, *United States Dep't of the Treasury* v. *FLRA*, 43 F.3d 682, 687 (D.C. Cir. 1994), and the FLRA itself applies a highly deferential standard of review when considering an arbitrator's interpretation of a collective bargaining agreement, see, *e.g.*, *United States Dep't of Veterans Affairs Med. Ctr.*, 60 F.L.R.A. No. 67, 2004 WL 2248115, at *4 (Sept. 24, 2004).

Whatever the appropriate standard in cases involving 5 U.S.C. 7122(a)(2), however, it has no relevance to this case. The FLRA set aside the arbitral award at issue not under Section 7122(a)(2), but rather under Section 7122(a)(1), which authorizes the FLRA to invalidate an award when it is "contrary to any law, rule, or regulation."[3] Courts have held that, when acting under Section 7122(a)(1), the FLRA may review an arbitrator's legal determination *de novo*, see, *e.g.*, *Department of Treasury*, 43 F.3d at 687, and petitioners do not challenge the use of *de novo* review in cases arising under that subsection. Because any question concerning the applicability of the *Steelworkers* trilogy to cases arising under Section 7122(a)(2) is not properly presented here, further review on that question is unwarranted.

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[3] Petitioners do not directly challenge the FLRA's decision to set aside the arbitral award here under Section 7122(a)(1) rather than Section 7122(a)(2). In any event, such a challenge (like petitioners' challenge to the court of appeals' application of the *Leedom* exception, see pp. 8-9, *supra*) would necessarily be case-specific and would not merit this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2004